LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
AUG 14 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 388

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, *Petitioner*,

v.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BERNARD CUSHMAN
5025 Wisconsin Avenue, N.W.
Washington 16, D. C.

EDWARD D. COWART
1201 First National Bank Building
Miami 32, Florida

MOZART G. RATNER
1411 K Street, N.W.
Washington 5, D. C.
Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	3
A. Proceedings Below	3
B. The "Purchase and Sale" Transaction	6
1. Pawley's Retention of Beneficial Interest	6
2. Pawley's Retention of Control	9
3. The Pervasiveness of Private Control	10
4. Substitution of Civil Service for Collective Bargaining and the Right to Strike	15
5. Intended Circumvention of the National Labor Relations Act	17
C. The General Counsel's Tentative Declination To Issue a Complaint	18
Reasons for Granting the Writ	20
Conclusion	30

Appendix A

Order of the Supreme Court of Florida	A-1
Opinion of the District Court of Appeal of Florida	A-2
Opinions and Orders of the Circuit Court of the Eleventh Judicial Circuit, In and For Dade County, Florida:	
Final Decree	A-19
Opinion	A-21

Page

Order Denying Petition for Rehearing A-36
Oral Ruling and Opinion A-37
Order on Plaintiff's Petition for Supplemental Relief A-47
Oral Comments by the Court A-48

APPENDIX B

Excerpts from the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. § 141, et seq. A-54

CASES CITED

Al J. Schneider Co., 87 NLRB 99 (1949) 21
Amalgamated Ass'n v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951) 4, 15
Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957) 2
Babcock and Wilcox Co., 108 NLRB 1622 (1954) 23
Bank of Philippines v. Rogers, 165 F. Supp. 100 (D.C. 1958) 24
Bank of the United States v. The Planters' Bank of Georgia, 9 Wheat. (22 U.S.) 904 (1824) 23
Boston Elevated Ry Co. v. Welch, 25 F. Supp. 809 (D. Mass. 1939) 27
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 27
California v. Taylor, 353 U.S. 553 (1957) 21, 24, 27
Cherry Cotton Mills v. United States, 327 U.S. 536 (1946) 26
Coale v. Société Co-Op., 21 F.2d 180 (S.D.N.Y. 1921) ..24, 26
Commercial Pacific Cable Co. v. Philippine Nat. Bank, 263 Fed. 218 (S.D.N.Y. 1920) 24
Cooper v. Aaron, 358 U.S. 1 (1958) 21, 28
Davis v. Gray, 16 Wall. (83 U.S.) 203 (1873) 23
Division 1267, Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Employees of America v. Ordman, 116 U.S. App. D.C. 7, 320 F.2d 729 (1963) 19, 23
Eppinger & Russell Company, 56 NLRB 1259 (1944) .. 27
Federal Land Bank v. Priddy, 295 U.S. 299 (1935) 25
Gomillion v. Lightfoot, 364 U.S. 339 (1960) 20
Hall v. Wisconsin, 13 Otto (103 U.S.) 5 (1880) 23

Page

Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir. 1962) 27
Hanna Mining Co. v. District 2, MEBA, 127 N.W. 2d 393 (Wis. 1964) 29
Hill v. Florida, 325 U.S. 538 (1945) 27
Hitchman Coal Co. v. Mitchell, 245 U.S. 229 (1917) .. 24
Hoosier Veneer Co., 21 NLRB 907 (1940) 24
Ineres Steamship Co. v. International Maritime Workers Union, 372 U.S. 24 (1963) 28
Inland Waterways Corp. v. Young, 309 U.S. 517 (1940) 26
International Longshoremen's Ass'n, AFL-CIO v. Georgia Ports Authority, 217 Ga. 712, 124 S.E.2.d 733 28
Marine Engineers v. Interlake Co., 370 U.S. 173 (1962) 28
Matthews v. Huwe, 269 U.S. 262 (1925) 2
Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So.2d 194 (1946) 5
Moore v. Board of Trustees of Wabash & Erie Canal, 7 Ind. 462 (1856) 24
Motor Coach Employees v. Missouri, 374 U.S. 74 (1963) 20, 26, 27
National Marine Eng'rs Beneficial Ass'n v. NLRB, 274 F.2d 167 (2d Cir. 1960) 24
NLRB v. E. C. Atkins & Co., 331 U.S. 398 (1947) 25
NLRB v. Bachelder, 120 F.2d 574 (7th Cir. 1941) 24
NLRB v. Colten, 105 F.2d 179 (6th Cir. 1939) 25
NLRB v. Hearst Publications, 322 U.S. 111 (1944) ..24, 25
NLRB v. Randolph Electric Membership Corporation, Nos. 9437 and 9438, filed June 1964, 4th Cir. 26
NLRb v. Russell Mfg. Co., 187 F.2d 295 (5th Cir. 1951) 23
Ohio Valley Builders Exchange v. Carpenters (Ct. Com. Pleas, Ohio, 1962), 50 LRRM 2573 29
Parden v. Terminal Railway, 377 U.S. 184 (1964) .22, 23, 24
Pennsylvania v. The Wheeling Bridge Company, 13 How. (54 U.S.) 518 (1852) 23
Plumbers v. County of Door, 359 U.S. 354 (1959) ..22, 27
Retail Clerks v. Schermerhorn, 373 U.S. 746 (1963) ..2, 28
San Diego Unions v. Garmon, 359 U.S. 236 (1959) ..28, 29
Schermerhorn v. Local 1625, 141 So.2d 269 (1962) .. 2
Schwabacher v. United States, 334 U.S. 182 (1948) 24
Sioux Valley Elec. Ass'n, 122 NLRB 92 (1958) 15
Sloan Shipyards Corp. v. United States Shipping Bd., 258 U.S. 549 (1922) 22

Page

Southland Mfg. Co., 94 NLRB 813 (1951) 23
Tampa Shipbuilding Co., 62 NLRB (1945) 23
Tate v. Philadelphia Transportation Co., 410 Pa. 490, 190 A.2d 316 (1963) 21, 24
Terry v. Adams, 345 U.S. 461 (1953) 20
Tumey v. Ohio, 273 U.S. 510 (1927) 2
United Mine Workers v. Arkansas Oak Flooring Co., 351 U.S. 62 (1956) 29
United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929) 24
United States Grain Corp. v. Phillips, 261 U.S. 106 (1923) 26
United States v. Rainwater, 244 F.2d 27 (8th Cir. 1957) 26
United States Shipping Bd. Corp. v. Western Union Tel. Co., 275 U.S. 415 (1928) 24
United States v. United Mine Workers, 330 U.S. 258 (1947) 6, 20, 21, 22, 25, 27
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 22

STATUTES CITED

28 U.S.C. § 1257(3) 2

Florida Statutes § 839.221(3) 5, 15

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 141 3

Sec. 1 25
Sec. 2(2) 5, 6, 19
Sec. 7 3
Sec. 8(a)(1) 19
Sec. 8(a)(3) 19
Sec. 8(a)(5) 19
Sec. 13 3
Sec. 14(c) 15

Page

MISCELLANEOUS CITED

Ballantine on Corporations (1946) 26

Cohen, Morris Raphael, Property and Sovereignty 13 Cornell L.Q. 8 (1927) 26

NLRB, Twenty-Third Annual Report (G.P.O., 1959) 15

NLRB, Twenty-Sixth Annual Report (G.P.O.. 1962) 15

Hearings on Administration of the Labor Management Relations Act by the NLRB, Part 2, 87th Cong., 1st Sess. 19

S. 2926, 73rd Cong., 2d Sess. (1934) Sec. 3(2), in 1 Leg. Hist. N.L.R.A., G.P.O., 1949 26

H.R. 3020, 80th Cong., 1st Sess., Sec. 2(2), in 1 Leg. Hist. L.M.R.A., G.P.O., 1948 26

93 Cong. Rec. 6527, 2 Leg. Hist. L.M.R.A. 1605 26

105 Cong. Rec. 6733-6740 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

AMALGAMATED ASSOCIATION OF STREET ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267, *Petitioner*,

v.

DADE COUNTY, a political subdivision of the State of Florida, and the METROPOLITAN DADE COUNTY TRANSIT AUTHORITY, a governmental entity of Dade County, Florida, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, Division 1267, a labor organization, prays that a writ of certiorari issue to review the decision and order of the Supreme Court of Florida, dismissing an appeal from a decision of the District Court of Appeal of

Florida, Third District, overruling petitioner's conflict and preemption objections to a declaratory judgment and injunction issued by the Circuit Court of Dade County, Florida, barring collective bargaining and strikes in the nominally government owned and operated municipal transit system of Dade County.

OPINIONS BELOW

The opinions and orders of the Circuit Court of Dade County, Florida (App., pp. A 19-53, *infra*), are not officially reported. The opinion of the District Court of Appeal (App., pp. A 2-19, *infra*) is reported at 157 So.2d 176. The order of the Supreme Court of Florida (App., p. A 1, *infra*) is not officially reported.

JURISDICTION

The dismissal order of the Supreme Court of Florida was entered May 18, 1964 (A 1). The decision appealed from clearly and unequivocally passed upon and rejected petitioners' constitutional objections and continued in effect the declaratory order and injunction of the trial court (A 19-20, 47-48). The Supreme Court of Florida indisputably "could have taken" petitioners' appeal, and its *sua sponte* dismissal thereof for want of "jurisdiction" consequently amounts to adjudication that the federal questions are "frivolous." *Matthews* v. *Huwe*, 269 U.S. 262, 265 (1925); *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Amalgamated Meat Cutters* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 22 (1957); *Schermerhorn* v. *Local 1625*, 141 So.2d 269, (1962), aff'd, *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 754-57 (1963), 375 U.S. 96 (1963).

This Court has jurisdiction under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether State prohibition of collective bargaining and strikes by employees of a nominally government owned and operated municipal transit system, which is actually privately owned and operated, conflicts with Sections 7 and 13 of the National Labor Relations Act and therefore violates the Supremacy Clause?

2. Whether federal preemption bars a State court from asserting power to decide that the Government exemption applies to and excludes from National Act coverage a municipal transit system which, at least arguably, is in fact privately owned and operated?

3. Whether the bar is removed by the tentative declination of the General Counsel of the National Labor Relations Board to issue a complaint on the theory that the exemption does apply?

STATUTES INVOLVED

Relevant provisions of the Labor Management Relations Act, 1947, 61 Stat. 136, 29 U.S.C. 141, *et seq.*, are set out in Appendix B, *infra*, pp. A 54-58. Pertinent provisions of a Dade County ordinance and of a Florida statute construed below are set out in the opinion of the District Court of Appeal, A 6, n. 3, A 17, *infra*.

STATEMENT

A. Proceedings Below

On November 30, 1961, Dade County and its Transit Authority filed in the Circuit Court of Dade County a complaint for declaratory judgment that immediately upon transfer of title and possession of the municipal transit system from its sole proprietor, W.

D. Pawley, to Dade County, pursuant to certain contracts, a trust agreement and a municipal ordinance, transit employees would lose their right to bargain collectively and to strike (A 3, 5-6; J.A. I, 1-19).[1]

By motion to dismiss (J.A. III, 102) and repeatedly thereafter[2] petitioners urged (A 7, 47) that as long as Pawley or any private investor retains a beneficial interest or actual operating or managerial control the system will remain covered and its employees protected by the National Act;[3] that ostensible County proprietorship without actual full dominion could not divest or defeat coverage; that if the County assumes the role of "employer" without "ultimate control" the County will be subject to the Act; that Florida is forbidden by the Supremacy Clause, by means short of actual, unconditional, immediate, and full government ownership and operation, to outlaw or defeat the federal right to bargain collectively and strike over terms and conditions of transit employment and that Florida

---

[1] The six volume Joint Appendix to the briefs of the parties below, which is bound and paginated separately, has been transmitted to this Court by the Clerk of the Court below, and the designation "J.A." herein refers thereto. References to portions of the record not included in the Joint Appendix are designated "R." References to the Exhibits are designated "P" or "D" "Exh.", followed by a number representing the page.

[2] Answer (J.A. III, 115, 126-127, 133-137), oral argument (R. 740-804), petition for rehearing (J.A. V, 221-241); motion to dismiss petition for suplemental injunctive relief (R. 225-253).

[3] The record shows, and the parties stipulated (J.A. IV, 152-154), that the Pawley transit system affects interstate commerce within the meaning of the Act and that the National Labor Relations Board would, under its jurisdictional policy standards, assert jurisdiction over its labor relations. See *Amalgamated Ass'n* v. *Wisconsin Employment Relations Bd.*, 340 U.S. 383, 391-392, notes 13 and 14 (1951).

courts are powerless to sustain the County's claim of immunity under Section 2(2), which provides "[t]he term 'employer' * * * shall not include * * * any State or political subdivision."

The trial court, rejecting the County's contrary contention, found that the contractual arrangements and trust agreement do "in fact" reserve to Pawley a substaintial financial and operating control (A 19-20, 24-25, 28, 37). It held, however, that his financial interest and control does not impair the County's immunity (A 29, 30-31, 35). It construed Section 2(2) as clearly exempting "wholly owned government corporations or 'authorities'" *as such* (A 9, 30, 45, 51, 52-53). Since the Transit Authority is a government entity, it is exempt regardless of private ownership and control of the transit system.

The trial court reasoned that private interest and control over the transit system make no difference because Government immunity to strikes and collective bargaining cannot be divested by implication (A 26, 27, 38, 41-42, 43, 44). It therefore rejected petitioners' contention that Florida Statutes § 839.221(3) (App. A 6, n. 3), should be construed to emplower a County to bargain collectively and leave it vulnerable to strikes when it "takes over" a utility in which the former owner "in fact * * * maintains a substantial financial or operating control." The Court concluded (A 25-26, 39-40, 43-44), that Florida's government-employee labor relations policy applied (*Miami Water Works Local 654* v. *City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946)) and issued a declaratory judgment and an injunction prohibiting collective bargaining and strikes against the County and Transit Authority as transit employer (A 19-20, 47-48).

The District Court of Appeal affirmed. It held that the record "contains abundant support" for the chancellor's control finding (A 15):

> "because (1) effectual managerial and financial control are in the hands of a management firm and a firm of consulting engineers, the approval of whose appointment by Mr. Pawley was both necessary and obtained; (2) prior to changing these two firms for others, approval of the trustees is required; and (3) Pawley can both remove and appoint the trustees at will. Therefore, through his power to control the trustees, Pawley has a substantial control of the transit system through the management firm and the consulting engineers."

But it sustained the Chancellor's conclusion that such control does not make the transit system or the County as "employer" therein "arguably subject" to the Act (A 9, 13-14). It reached this conclusion by (a) rejecting interpretation of *United States* v. *United Mine Workers*, 330 U.S. 258 (1947) as limiting the Government-employer exemption to enterprises in which Government has "ultimate control" as of right (A 13-14); (b) finding that petitioners had not carried "the burden of demonstrating error" in the Chancellor's construction of Section 2(2) and (c) relying upon the General Counsel's tentative declination to issue a complaint, erroneously describing his reasons as "findings" by the "Board." (A 7-10).

B. The "Purchase and Sale" Transaction

1. Pawley's Retention of Beneficial Interest

The contracts between Pawley and Dade County characterize as an immediate, outright, "purchase and sale" a plan by which the County cannot acquire actual

ownership and control unless and until it pays the agreed net purchase price, five and a half million dollars, entirely out of prospective transit profits. This will take at least fifteen years and perhaps forty or more (J.A. II, 78, D. Exh. FF, 60-62; D. Exh. EE, 28-30). The County cannot shorten the period; it is forbidden by its contract with Pawley to pay any part of the "purchase price" except out of future profits.[4] (J.A. I, 42-43, J.A. IV, 164; P. Exh. 1, p. 4).

The contracts use elaborate legal paraphernalia to conceal the actual locus of beneficial interest and control. The purchase and sale agreement declares that upon taking possession, the County will "operate the properties * * * free of any financial or operating control by Pawley" (J.A. I, p. 48). The Agreement for Delivery of Possession proclaims (J.A. II, 93):

> "2. COUNTY OWNERSHIP. Upon delivery of possession in accordance with the provisions of paragraph 1 of this Agreement, the County shall become the full, absolute and sole owner and operator of said transit system, and W. D. Pawley shall not thereafter have or exercise any financial or operating control over said transit system. The sole rights of W. D. Pawley in respect to said transit system shall consist of the right to receive revenue bonds in payment of the purchase price

---

[4] The agreement for sale and purchase explicitly provides (J.A. I, 41-42), "the taxing power of the County shall never be directly or indirectly or contingently involved, and * * * the purchase price of the Companies and all principal and interest on any obligations issued to secure such purchase price, and all operating and other expenses of operation shall be payable solely from the revenues of the transit operations." The agreement for delivery of possession provides (J.A. II, 96): "No county tax funds shall be utilized in any manner in connection with the purchase or operation of said transit system."

> for said transit system as fixed and determined by the existing agreements between the parties, as modified by this agreement, at the time of closing."

The "revenue bonds" referred to are actually certificates of beneficial interest, exchanged for equivalent stock in Pawley's wholly-owned corporations. The County acquires "title" to the transit system by "purchasing" that stock. But immediately upon receiving the stock, the County must "liquidate the transit companies so that title to the assets owned by such corporations shall become vested in the County." (J.A. I, 48; J.A. II, 92-93). Beneficial interest cannot follow the title, for the County neither pays, nor obligates itself to pay, any part of the purchase price. The Trust Agreement (D. Exh. 1, hereinafter referred to by Section number) provides (J.A. V, 198, Section 1306):

> "Nothing in the bonds or coupons or in this Agreement shall be construed as pledging either the faith and credit or the taxing power of the County for their payment, or to create any debt against the County, or as conveying or mortgaging the Transit System or any part thereof."

The County's sole obligation is to operate the transit system in accordance with the provisions of the trust agreement,[5] as long as any of the "bonds" are outstanding. If the County defaults, title and possession necessarily revert to Pawley. Any violation of the Trust Agreement or failure to pay a scheduled bond installment is an "event of default" which entitles the

---

[5] This is a bilateral contract between Pawley and the County (P. Exh. 1, p. 123; J.A. II, 98; J.A. IV, 166), which Pawley either drafted or approved (J.A. IV, 166, Tr. 503-507, 523-526, 530-531) and which cannot be changed without Pawley's consent.

holder of a majority of the bonds to have all the bonds declared due and payable at once (Sec. 802).[5a] Since the County can pay up only out of profits, such a declaration guarantees reversion.

"Interest" on the bonds (assumed to be tax exempt) is calculated to provide a return on Pawley's investment equivalent to his former net profit after taxes (D. Exh. EE, pp. 26, 34, 35-38, 40). The bonds are initially scheduled to mature over a fifteen-year period, which may, by agreement, be extended to forty years (Sec. 211). There is no provision for disposition of the transit system if the agreement is not extended or if any bonds remain outstanding after forty years.

2. Pawley's Retention of Control

The Trust Agreement binds the County and the Transit Authority, as long as any bonds are outstanding, to "maintain and operate the Transit System in an efficient and economical manner and in conformity with * * * this Agreement" (Sec. 703); to adopt whatever "ordinances and resolutions are necessary to carry out [their] obligations" thereunder (Sec. 708); not materially to amend the Ordinance establishing the Transit Authority (J.A. V, 196; Sec. 711); to "continuously use their best efforts to obtain and maintain the highest possible volume of business from the ownership and operation of the transit system and [not] voluntarily suspend the operation * * *" (Sec. 712); not to "sell, lease or otherwise dispose of or encumber the Transit System" (Sec. 710); to maintain the system in sound repair (Sec. 703); to keep "the funds

---

[5a] Failure is excused, however, "if the Transit Authority shall comply with all of the recommendations of the Consulting Engineers in respect of the rates, fares and charges" (Sec. 502).

and accounts of the Transit System * * * separate from all other funds and accounts of the County or of any of its departments," and to furnish bondholders reports, audits and information (Sec. 709).

The County pledges and assigns all income from the transit system to trustees for the benefit of bondholders (Secs. 505, 601). The money "shall be * * * applied only in accordance with the provisions of this Agreement * * * and shall not be subject to lien or attachment by any creditor of the County or of the Transit Authority" (Sec. 601). The trustees are required to allocate the income to various funds and reserves for equipment replacement, damages, construction, insurance, interest and principal payments, etc., in accordance with detailed specifications in the Trust Agreement or the judgment of the consulting engineers or the management company (Secs. 505-601).

The County and Transit Authority agree that if they default on "any * * * of the covenants, conditions, agreements and provisions contained in * * * this Agreement on the part of the County to be performed" (Sec. 802), they shall be subject to such "suits, actions or special proceedings in *equity* or at law, either for *the specific performance of any covenant contained herein* or in aid or execution of *any power* herein granted or for the *enforcement of any proper*, legal or *equitable remedy* * * *" (Sec. 804) (Emphasis added).

3. The Pervasiveness of Private Control

The Trust Agreement covers every facet of transit policy and management and binds the County as to each. From the outset, the Transit Authority must operate "along the routes of the Transit System which

are presently established by the Companies and * * * will not make any changes in or additions to such routes * * * unless" the consulting engineers recommend such changes as "necessary and desirable" (Sec. 706, p. 84). Before beginning operations the County must "fix and place in effect the rates, fares and charges * * * which are then being charged * * * or such other rates, fares and charges which the consulting engineers shall have certified will not in their opinion produce less net revenues than" (Sec. 501, p. 56) "will be more than sufficient to pay the estimated annual cost of maintaining, repairing and operating the Transit System and the interest on the principal of the bonds" (Sec. 6, par. 3).

The County cannot thereafter "revise any schedule of rates and charges until after receiving the recommendations of the Consulting Engineers" (Sec. 501(d), p. 57). It cannot make any reduction in rates, fares or charges unless, in the opinion of the consulting engineers, the reduction will not produce less revenue than required to meet current expenses, pay interest and principal, and credit reserve accounts (Sec. 502, p. 58). If revenue falls off, the Transit Authority must request the consulting engineers to make a recommendation for revision. As majority bondholder, Pawley is entitled to be kept constantly informed of day-to-day operation of the transit system (Sec. 709, pp. 86-88; Sec. 406, p. 55; Sec. 407, p. 55; Sec. 502, p. 59; Sec. 503, p. 61; Sec. 504, pp. 61-62).

The Transit Authority must follow the recommendations of the consulting engineers with respect to rates, fares and charges for improvements (Sec. 501(b), pp. 56-57); free transportation (Sec. 501(c), p. 57); insurance (Sec. 707, p. 85); construction of the central

garage (Sec. 702, pp. 81-82); and sale of buses, machinery or equipment of all kinds (Sec. 710, pp. 88-89). It must have the consulting engineers make an annual inspection and recommendations for the coming fiscal year with respect to maintenance, repair and operation, insurance, improvements, replacements and renewals, reserves and revisions of rates, fares and charges (Sec. 503, pp. 60-61). From the mangement company it must receive a recommended annual operating budget (J.A. II, 70).

The County is *required* (Sec. 705, pp. 83-84) "for the purpose of performing and carrying out the duties imposed on the Consulting Engineers by this Agreement [to] employ an independent engineer or engineering firm or corporation having a nation-wide and favorable repute for skill and experience in such work. * * *" The agreement provides that before "employing any * * * firm * * * other than the Consulting Engineers (Coverdale & Colpitts) * * * and the management agency (National City Management Co.) who are now employed by the Transit Authority," the Transit Authority must secure "the written approval of the Trustee. * * *" (*Ibid.*, p. 84).

The County is also *required* to employ "a Transit Superintendent or management agency having a nation-wide and favorable repute for skill and experience in such work" (Sec. 705, p. 84). The compensation of the management company is "2.5 percent of the gross revenues derived from the operation" (J.A. II, 67). Before approving the Trust Agreement, Pawley not only knew which company had been retained "to manage and supervise the operation" (J.A. II, 67), subject to all applicable requirements of the Trust Agreement (J.A. II, 70), but that it had arranged to keep his

entire "management team" on the payroll (Tr. 403-405, 408, 504-506). A Transit Superintendent is to be designated by the management agency (J.A. V, 184). Pawley's General Manager, Cuevas, was retained by the management company for this role (J.A. IV, 148-152). Pawley can assure retention of his management team because the "period" of any contract between the County and a management company, "and the terms and conditions thereof, including the amount of compensation to be paid to the contractor thereunder," are "subject to the approval of the Consulting Engineers" (Sec. 1301, p. 115).

As the Court of Appeal found, p. 6, *supra*, Pawley has unfettered power to remove and appoint the trustees at will (Sec. 913, p. 104; Sec. 914, p. 105, Sec. 807, p. 97) and through them controls the management firm and the consulting engineers. The Trustee and Co-Trustee, Consulting Engineers and the Management Company are all paid exclusively out of transit revenues (Sec. 905, p. 101; J.A. IV, 152).

An expert witness testified without contradiction that "there is no principal function of management that remains with the [County or Transit Authority]. It all is in the hands of either the consulting engineers, the trustees, or the management company. The hands of the Transit Authority as such are bound" (J.A. IV, 156; R. 458). County Attorney Davis admitted that under the Trust Agreement the "consulting engineer * * * in fact * * * is running the show * * * and I think rightfully so" (R. 918). According to George N. Shaw, the County's independent financial consultant, "the Transit Authority, an agency of Dade County, has the financial control under the advice and consent, as it were, of the consulting engineer, the management firm,

and the trustees" (R. 658). The Chairman of the Transit Authority, Butler, testified (J.A. IV, 169-170; R. 551-552) that the Transit Authority "could not supervise it. * * * We do not have the knowledge to run a bus line."

The record shows that the powers over management reserved by Pawley and his agent-trustees, the management company and the consulting engineer, are "most unusual * * * for this type of instrument" (J.A. IV, 158-160, 179-181). Even Shaw admitted that he knew of no other revenue bonds issued in ostensible payment for an existing business, and no other Trust Agreement which *requires* the ostensible "owner" to retain an independent management company approved by the ostensible "creditor" to manage the operation (R. 654-655); or which makes the "advice and consent" of an independent engineer a condition precedent "in operating situations and budget" (R. 658-659).[6]

The trial court found (A 37), that since the County was neither to invest any of its funds nor pledge its credit, and, therefore, took no risk of loss, Pawley was naturally unwilling to relinquish to it actual control over his property. Initially, the parties planned to leave the management function to Pawley directly. When, in response (R. 908, 925; J.A. IV,

---

[6] "Q. [By Mr. Ratner] Do you know of any comparable bond issue? Are you familiar with any comparable bonds issued under a comparable trust indenture which provides for distribution of a majority of the bonds to be issued to a single bondholder?

"A. [By Mr. Shaw] My answer to that would be no because I don't know of any of my own experience and knowledge of any transactions which have had the situations involved which exist here, where there is a system being acquired and paid by part of the bond issue." (R. 654-655).

173-176), the Florida legislature exempted from its 1959 government-employee, civil service, anti-strike law any public utility "taken over" by a County in which the former owner "in fact * * * maintains a substantial financial or operating control" (Florida Statutes § 839.221(3)), Pawley and the County vested the management function in independent private contractors subject to Pawley's disguised authority (J.A. IV, 173-176).

4. Substitution of Civil Service for Collective Bargaining and the Right to Strike

In 1959, Congress voted down an amendment proposed by Senator Holland of Florida to overrule *Amalgamated Ass'n.* v. *Wisconsin Employ. Rel. Bd.*, 340 U.S. 383 (1951), and empower the States to "regulate or qualify the right of employees of a public utility to strike, or * * * prohibit strikes by such employees." 105 Cong. Rec. 6733-6740. Congress in that year authorized the National Board to cede to the States jurisdiction over certain classes of covered enterprises (Section 14(c)). But it decided that federal law exclusively should continue to govern "all labor disputes involving local public utilities which exert or tend to exert a pronounced impact on commerce." *Sioux Valley Elec. Ass'n*, 122 NLRB 92, 94 (1958). Accordingly, Congress withheld power to cede jurisdiction over any municipal transit system having a gross annual volume of $250,000 or more. NLRB, *Twenty-Third Annual Report* (G.P.O., 1959), p. 8; NLRB, *Twenty-Sixth Annual Report* (G.P.O., 1962), p. 26.

On August 2, 1960, in contemplation of the Miami Transit deal, Dade County adopted its Transit Authority Ordinance, 60-23. The ordinance provides that

upon County acquisition of a transit system its employees "shall be deemed, considered or construed as County employees" (J.A. I, 35), and that current pay scales, seniority, vacation and sick leave rights shall be maintained (A 17).

The role of this provision was explained in the feasibility reports of Coverdale and Colpitts, the consulting engineers, dated March 17, 1961, and September 29, 1961, upon which the transaction was grounded (D. Exh. EE, pp. 20-21): "The nature of the transit business is such that labor cost inherently represents a large portion of the revenue received." Thus, "by far the largest single item of expense is labor payroll, and of this labor cost, the bulk of it is the cost of bus operators." Labor costs must not be permitted to "exceed 55 per cent of the gross revenue * * * if the venture is to meet its financial obligations [to Pawley] * * *." Therefore, "there is a definite limit to expenditure for wages unless there are compensating increases in revenue. This we believe to be fundamental to a successful operation." However, "revenue can only be increased within certain limits before the loss of traffic will offset revenue gains." Under the projected arrangement, the necessary ceiling can be placed on wages because: "It is our understanding that under County ownership the employees of the present companies would become County employees, and as such would not have the right to negotiate labor agreement or to strike."

The Trust Agreement provides that "all compensation, salaries, fees and wages paid by the Transit Authority in connection with the maintenance, repair and operation of the Transit System will be reasonable, that no more persons will be employed by it than are

necessary for the efficient and economical operation of the Transit System" (Sec. 703, p. 83). Thus, the agreement gives Pawley veto power over any future increase in wages or labor costs which would make "labor payroll" exceed "55 per cent of the gross revenue."

Substitution of the County for Pawley in the role of proprietor-employer would enable Pawley to continue to post "earnings records * * * among the best of the American transit industry" (D. Exh. EE, 19). Even if, in the role of "employer", Pawley could successfully resist future strike backed demands for wage increases, strikes would permanently reduce rider patronage. This had happened in 1960 (J.A. IV, 147-148; D. Exh. FF, 54-55; D. Exh. EE, 11, 12, 18), and a demand for a wage increase backed by a threat of a strike was anticipated when petitioners' collective bargaining contract expired in 1961 (D. Exh. EE, 17). The projected tax-free, five per cent return in the form of "interest" on an investment valued at over five million dollars, secured against strikes by nominal County ownership and operation, would be higher than Pawley's anticipated net after tax income as legal owner (D. Exh. EE, pp. 26, 34, 35-38, 40; cf. R. 622-623).

5. Intended Circumvention of the National Labor Relations Act

Characterizing the transfer of title and possession as an "acquisition" (A 28), and casting the County in the role of "employer," was obviously designed to evade collective bargaining and the right to strike (J.A. I, 1-19; J.A. IV, 113-176). Indeed, the County decided to consummate the arrangement hurriedly in order to head off a strike by interposing its assumed gov-

ernmental immunity. (J.A. IV, 173-174; R. 777, 907, 1070).

When Judge Eaton ruled (A 29-31, 34-35, 39, 41-44) that as long as the resident supervisory personnel were on the management company's payroll (R. 86-89, 539, 543, 551-553, 555-556, 557-558, 561-563, 664, 667-668, 675, 680, 682, 699-702, 703, 705-706), that company would be a "joint employer" with the County, against whom federal rights might survive (J.A. V, 209-216, 219-220, 249-259, 245-246), the County amended the management contract and put Pawley's "management team" on the "County payroll" (R. 79, 81-83, 85-88, 89-91).[6a] The County Manager, McNayr, admitted that the transfer was made to defeat survival of federal collective bargaining rights and thereby "guarantee to the people of this area * * * transit [service] without the threat of strikes * * *" (R. 1074).

On February 9, 1962, by agreement with Pawley (J.A. II, 90-98), the County took "possession" of the Transit System and conditioned transit employment upon relinquishment of rights guaranteed and protected by federal law (R. 280-283).

C. The General Counsel's Tentative Declination To Issue a Complaint

On or about December 19, 1961, petitioners filed charges and thereafter amended charges with the National Labor Relations Board, alleging that by disclaiming power to bargain collectively, substituting civil service for collective bargaining as the method of regulating transit wages, hours and working conditions, and conditioning transit employment upon re-

[6a] That, however, is, of course, a separate payroll, funded exclusively from transit revenues.

linquishment of the federally-guaranteed right to bargain collectively and to strike, Dade County and Pawley were committing unfair labor practices in violation of Section 8(a)(1), (3) and (5) of the National Labor Relations Act (R. 1178-1181). The former General Counsel processed these charges under a procedure administratively devised and reserved for substantial, novel and difficult questions of law.[7] He decided ultimately not to issue a complaint, pending conclusion of the state court proceeding. He reasoned that "the statutory exemption in Section 2(2) of the National Labor Relations Act is applicable" to the transit enterprise because "the County is the employer of the employees who are or will be engaged in the operation of the transferred transit lines; * * * and * * * the sale and purchase arrangements between Pawley and Dade County do not require a different conclusion." (A 7-8; R. 150-152, 162-167; J.A. III, 126, 127, 133-137).

Petitioners thereafter brought an action in the United States District Court for the District of Columbia to compel the General Counsel to issue a complaint. Dismissal of that action was affirmed on the ground that the General Counsel's tentative declination to issue a complaint is within the scope of his unreviewable discretion. *Division 1267, Amalgamated Ass'n. of St., Elec. Ry. and Motor Employees of America* v. *Ordman*, 116 U.S. App. D.C. 7, 320 F. 2d 729 (1963).

---

[7] The Nature, Function and Administrative Operation of the Office of Appeals and The Administrati e Operation of the Advice Branch, in Hearings Before the House Subcommittee on the National Labor Relations Board, 87th Cong. 1st Sess. (1951). Part 2, pp. 1138, 1163.

REASONS FOR GRANTING THE WRIT

1. In *Motor Coach Employees* v. *Missouri*, 374 U.S. 74, 82 (1963), this Court held that a State cannot defeat the right to strike against a public utility "through the fiction of 'seizure' by the State." The question in this case is whether it can do so through the fiction of immediate, unconditional, "purchase and sale."

Missouri holds (374 U.S. at 81), that Section 2(2) removes from coverage only enterprises which are "actually * * * state owned and operated." The limitation is defeated if the exemption immunizes Government when it assumes control of the employment relation in the guise of "employer" without "full title and ownership." *United States* v. *United Mine Workers*, 330 U.S. 258, 284-85, 288, 329-30 (1947). For if, in the role of "employer," the Government is beyond reach, the Act does *not* regulate "labor relations" where Government's "involvement" falls "short" of creating "a state-owned and operated utility" 374 U.S. at 81. If Congress' regulatory policy is to prevail, Government as "employer" *must* be covered wherever Government ownership and operation is incomplete.

Sovereign immunity qua "employer" is not a license to outlaw collective bargaining in public utilities which are not actually the sovereign's. "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960); *Terry* v. *Adams*, 345 U.S. 461, 466 (1953). Rights guaranteed by the National Act "can neither be nullified openly and directly by state legislators or

state executive or judicial officers, nor nullified indirectly by them through evasive schemes * * * whether attempted 'ingeniously or ingenuously.'" *Cooper* v. *Aaron,* 358 U.S. 1, 17, 18-19 (1958). Therefore, coverage cannot be defeated by the sophisticated scheme of making "civil service relationship" (*California* v. *Taylor,* 353 U.S. 553, 559-60 (1957)), an incident of nominal, deferred or contingent Government ownership and operation. Cf. *Tate* v. *Philadelphia Transportation Co.,* 410 Pa. 490, 190 A.2d 316, 317, 323 (1963).

In the *Mine Workers'* case this Court held that Government was entitled to exemption because, during seizure, it was actually the sole owner-operator of the mines. The presence of private managers was immaterial because they were only agents of the Government, removable at the Government's "discretion." By reserving removal power, Government "retained ultimate control." 330 U.S. at 288. Justices Black and Douglas considered it crucial (at 329), that "whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves." The Court was unanimous that if Government did not have that power, Government would not have been exempt from the Norris-LaGuardia Act. *Missouri* makes clear that it would not have been entitled to exemption under Section 2(2) either. 374 U.S. 74, 81, n. 8 and accompanying text.

The argument for treating the exemption as unqualified rests upon a misconception of the implied immunity doctrine to which the Labor Board was formerly committed. *Al J. Schneider Co.,* 87 NLRB 99, 100-01 (1949). The notion that "a political sub-

division must be expressly included in a statute if it is to be considered within the law's coverage" was explicitly rejected in *Plumbers* v. *County of Door,* 359 U.S. 354, 358-59 (1959): "This Court has many times held that government bodies not expressly included in a federal statute may, nevertheless, be subject to the law." Last term's decision in *Parden* v. *Terminal Railway,* 377 U.S. 184 (1964), re-emphasizes that express inclusion is not necessary to prevent immunity from defeating Congress' ascertainable objectives.

If States could defeat coverage by assuming "employer" status without "complete control" (*Mine Workers'* case, 330 U.S., at 329), Congress' condemnation of seizure (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 586, 657-60, 602-04 (1952)), would be illusory. Making "employer" status an incident of seizure must bring coverage, not exemption. "Grafting upon the words [of Section 2(2)] a purpose of Congress thus unequivocally expressed [by controlling legislative history] is the regular legislative mode for defining the scope of an Act of Congress." *Ibid.*, 343 U.S. at 603 (Frankfurter, J., concurring).

Seizure aside, the full ownership and actual operation limitation is necessarily implicit in Section 2(2). Congress exempted only "the sovereign." *United States* v. *United Mine Workers,* 330 U.S. 258, 272-73. It is "one of the first principles of our system of law" that when government participates in a joint venture with private entrepreneurs it is not "the sovereign properly so called." *Sloan Shipyards Corp.* v. *United States Shipping Bd.*, 258 U.S. 549, 565-67 (1922). In 1824, Chief Justice Marshall said:

> "It is, we think, a sound principle, that when a government becomes a partner in any trading

> company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted." *Bank of the United States* v. *The Planters' Bank of Georgia,* 9 Wheat. (22 U.S.) 904, 907 (1824).

The principle was reiterated in *Pennsylvania* v. *The Wheeling Bridge Company,* 13 How. (54 U.S.) 518, 560 (1852):

> "When a state enters into a copartnership, or becomes a stockholder in a bank, or other corporation, its sovereignty is not involved in the business, but it stands and is treated as other stockholders or partners."

If Government divests itself of sovereignty when it becomes a partner, *a fortiori* does it do so when it becomes a trustee or agent.[8] In such capacity, Government is "subject to congressional regulation * * * as fully as if it were a private person or corporation." *Parden* v. *Terminal Railway,* 377 U.S. 184, 196 (1964); *Hall* v. *Wisconsin,* 13 Otto (103 U.S.) 5, 11 (1880); *Davis* v. *Gray,* 16 Wall. (83 U.S.) 203, 232 (1873). Accordingly, the National Act has been held applicable to a state court receiver in the role of

---

[8] *NLRB* v. *Russell Mfg. Co.,* 187 F. 2d 296, 297 (5th Cir. 1951); *Babcock and Wilcox Co.,* 108 NLRB 1622, 1623 (1954); *Southland Mfg. Co.,* 94 NLRB 813, 815 (1951). But cf., *Tampa Shipbuilding Co.,* 62 NLRB 954, 960-961 (1945), which the General Counsel considered authority against issuance of the complaint herein. Brief for appellee in *Division 1267, etc.* v. *Ordman,* 17,649, D.C. Cir., pp. 33-35.

"employer." *NLRB* v. *Bachelder*, 120 F. 2d 574, 576, 579 (7th Cir. 1941), affirming *Hoosier Veneer Company* (1940), 21 NLRB 907, 908-09, 924, 926, 928-29, 932-33, 934-35, 935-36, cert. denied, 314 U.S. 647 (1941). The County's contractual interest and participation makes the transit system at best a "joint venture"; as joint venturer, the County is Pawley's agent-trustee. *Hitchman Coal Co.* v. *Mitchell*, 245 U.S. 229, 249 (1917); *National Marine Eng'rs Beneficial Ass'n* v. *NLRB*, 274 F. 2d 167, 171 (2d Cir. 1960); *Tate* v. *Pennsylvania Transportation Co.*, 410 Pa. 490, 190 A.2d 316 (1963).

For the purpose of National Act coverage, whether a venture is actually government owned and operated is a question "of federal law." *Parden* v. *Terminal Railway, supra*, 377 U.S. at 185, 187, 188.[9] Under federal law, an enterprise in which there is any private beneficial interest or independent right of control is not "government." "Instrumentalities * * * in which there are private interests are not departments of the government. They are private [enterprises] in which the Government has an interest." *United States Shipping Bd. Corp.* v. *Western Union Tel. Co.*, 275 U.S. 415, 426 (1928).[10] For example, federal land banks "are instrumentalities of the federal government, engaged in the performance of an important government function." But the fact that private investors may hold

---

[9] Cf. *NLRB* v. *Hearst Publications*, 322 U.S. 111, 123 (1944); *California* v. *Taylor*, 353 U.S. 553, 563 (1947); *Schwabacher* v. *United States*, 334 U.S. 182, 198 (1948).

[10] Accord, *Moore* v. *Board of Trustees of Wabash & Erie Canal*, 7 Ind. 462 (1856); *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F. 2d 199, 202 (S.D.N.Y. 1929); *Bank of Philippines* v. *Rogers*, 165 F. Supp. 100, 109-10 (D.C. 1958) aff'd 281 F. 2d 12 (D.C. Cir. 1959); *Coale* v. *Société Co-Op.*, 21 F. 2d 180, 181 (S.D. N.Y. 1921); *Commercial Pacific Cable Co.* v. *Philippine Nat'l Bank*, 263 Fed. 218, 224 (S.D.N.Y. 1920).

stock in such banks "distinguish[es] them from the government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an *exclusively* governmental purpose." *Federal Land Bank* v. *Priddy,* 295 U.S. 229, 231, 232, 233 (1935).

Employees of such enterprises are not " 'Government employees' without more." *United States* v. *United Mine Workers,* 330 U.S. at 320 (Frankfurter, J., concurring), cf. 336-39, 345-51. If "the obligation to bear the financial burden of [employees'] wages and the receipt of the benefits of the hours worked" is not *really* or *exclusively* Government's "the conditions of the relation are such that the process of collective bargaining may appropriately be used as contemplated by the Act." NLRB v. *E. C. Atkins & Co.,* 331 U.S. 398, 414 (1947). Cf. *NLRB* v. *Colten,* 105 F. 2d 179, 183 (6th Cir. 1939); *NLRB* v. *Hearst Publications, Inc.,* 322 U.S. 111, 129 (1944).

The language and legislative history of Section 2(2) itself indicates that Congress intended to limit immunity to enterprises which are in fact wholly government owned and operated. Only "wholly owned" government corporations are exempt. Those with private shareholders are plainly covered. It is inconceivable that Congress could have intended to distinguish between corporations and other forms of "ownership association" (Act, Section 1), such as partnerships, business trusts, and the like, exempting joint public-private ventures *except* when ownership interests are organized in the corporate form.

To disregard private beneficial interest and independent control in a government enterprise is, in effect,

to exempt "government instrumentalities" as such. This Congress has repeatedly refused to do.[11]

Missouri holds that States cannot circumvent coverage by making title, possession and legal proclamations equal actual Government ownership and operation.[12] Federal law determines where the equities are by "look[ing] * * * at the facts beneath forms" (*United States Grain Corp.* v. *Phillips*, 261 U.S. 106, 113 (1923)); "realities become decisive." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524 (1940); *Cherry Cotton Mills* v. *United States*, 327 U.S. 536, 539 (1946); *United States* v. *Rainwater*, 244 F. 2d 27, 31-32 (8th Cir. 1957), aff'd 356 U.S. 590.

Dade County has not invested any funds or credit in the transit system and it therefore does not beneficially own any of the assets.[13] County "control" and

---

[11] S.2926, 73rd Cong., 2d Sess. (1934) Sec. 3(2) in 1 Leg. Hist. N.L.R.A. Govt. Print. Off. 1949, p. 2; H.R.3020, 80th Cong., 1st Sess., Sec. 2(2) in 1 Leg. Hist. L.M.R.A. Govt. Print. Off. 1948, p. 32. Senator Taft said in 1949 (93 Cong. Rec. 6527, 2 Leg. Hist. L.M.R.A. p. 1605): "The House bill contained a complete exemption of all Government instrumentalities of every kind, which include the national banks. We objected very strenuously to that. We included only wholly Government-owned corporations and Federal Reserve banks."

[12] In a recent brief to the Fourth Circuit, copies of which have been lodged with the Clerk, the Labor Board asserts that States cannot defeat coverage by "labeling a privately owned and privately operated enterprise * * * a 'political subdivision' ". Brief for the Board in *NLRB* v. *Randolph Electric Membership Corporation*, Nos. 9437 and 9438, filed June, 1964, p. 27. *A fortiori*, it would seem, should it be impossible to defeat coverage by labelling private ownership and operation public. Cf. Brief, pp. 18-27.

[13] That the County will accumulate the purchase price by siphoning profits to Pawley in the guise of repayment of capital and "interest" does not make Pawley a creditor or the County a debtor. *Coale* v. *Société Co-Op.*, 21 F. 2d 180, 182 (S.D.N.Y. 1921); *Cohen*, Morris Raphael, *Property and Sovereignty*, 13 Cornell L. Q. 8, 13 (1927); Ballantine on *Corporations* (1946), pp. 12-13.

operation is only nominal. "It would seem to be essential that the Government should have the ultimate right to make all decisions * * *." *Boston Elevated Ry. Co.* v. *Welch,* 25 F. Supp. 809, 811 (D. Mass. 1939).

Limitation of the exemption to enterprises in which Government has full beneficial interest evidenced by ultimate control is indispensable to prevent government immunity from inuring to the benefit of private entrepreneurs. *United States* v. *United Mine Workers,* 330 U.S. 258, 329 (Justices Black and Douglas, concurring). Federal policy does not allow "profits earned by [rejection of collective bargaining to] contribute to * * * the success [of a private investor]." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 724 (1961); *Hampton* v. *City of Jacksonville,* 304 F. 2d 320, 322-23 (5th Cir. 1962), cert. denied, 371 U.S. 911 (1962).

Of course, if Dade County in its capacity of transit "employer" is covered, Florida cannot constitutionally withhold from it power to bargain collectively or extend immunity to strikes. *California* v. *Taylor,* 353 U.S. 533, 567-68 (1957); *Hill* v. *Florida,* 325 U.S. 538, 542 (1945); *Eppinger & Russell Company,* 56 NLRB 1259, 1269 (1944).

Restriction of exemption to actually government owned and operated enterprises neither impairs nor interferes with any "essential state functions." *Plumbers* v. *County of Door,* 359 U.S. 354, 359 (1959). It does not "even remotely affect * * * the right of a State to own or operate a public utility or any other business." *Motor Coach Employees* v. *Missouri,* 374 U.S. 74, 83 (1963). All it does is prevent ostensible

state ownership and operation from defeating federal rights. That is essential if federal supremacy is to prevail. *Ibid.*, at 82; *Cooper* v. *Aaron*, 358 U.S. 1, 17-19 (1958).

2. Unless promptly rendered ineffectual by this Court, the technique of evading coverage by endowing a utility with governmental immunity indefinitely as the means of acquiring funds with which to purchase it will become a blueprint for wholesale nullification of Congress' refusal to exempt public utilities from the National Act. The Dade County experiment in evasion must not succeed.

3. Assuming that the stated argument for coverage is not frivolous, the Florida courts violated constitutional inhibitions by undertaking to evaluate and reject it. *Incres Steamship Co.* v. *International Maritime Workers U.*, 372 U.S. 24, 27 (1963); *Retail Clerks* v. *Schemerhorn*, 373 U.S. 746, 755-57 (1963); *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173, 182 (1962); *San Diego Unions* v. *Garmon*, 359 U.S. 236, 244-45 (1959).

The County's reliance upon *International Longshoremen's Ass'n, AFL-CIO* v. *Georgia Ports Authority*, 217 Ga. 712, 124 S.E. 2d 733, cert. denied, 370 U.S. 922 (1962), is entirely misplaced, for there were no private beneficial or control interests in that venture. Indeed, the Supreme Court of Georgia noted (124 S.E. 2d 733, 735) that the "Ports Authority holds title to the property it possesses *only* for the benefit of the State and the public." (Emphasis added.) Even the

Court of Appeal below conceded (A 13), that this "distinction is valid."

The Florida courts compounded the violation of adjudication by enjoining an arguably protected strike and collective bargaining. Florida is in violation of the Supremacy Clause.

4. Reliance upon the General Counsel's inaction to avoid the arguability bar is in square conflict with this Court's statement in *San Diego Unions* v. *Garmon*, 359 U.S. 236, 245-246 (1959) that "refusal of the General Counsel to file a charge * * * does not give the States power to act." In glaring contrast, the Supreme Court of Wisconsin recently recognized (*Hanna Mining Co.* v. *District 2, MEBA*, 127 N.W. 2d 393 (Wis. 1964), that *Garmon* prohibits state courts from treating "rulings of the general counsel [as] determinations of the NLRB," and according them emancipatory significance. The General Counsel's, of course, is not, a quasi-judicial office (*Ohio Valley Builders Exchange* v. *Carpenters* (Ct. Com. Pleas, Ohio, 1962) 50 LRRM 2573), and his declination can never do more than eliminate the possibility of decision by the Board. "Such elimination of the Board does not * * * eliminate the applicability of the National Labor Relations Act, as amended * * *." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 74 (1956).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be granted and the decision below reversed.

Respectfully submitted,

BERNARD CUSHMAN
5025 Wisconsin Avenue, N.W.
Washington 16, D. C.

EDWARD D. COWART
1201 First National Bank
Building
Miami 32, Florida

MOZART G. RATNER
1411 K Street, N.W.
Washington 5, D. C.

Counsel for Petitioners

August 14, 1964.